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February 9, 2009

VIA HAND DELIVERY AND E-MAIL

Courtney Feeley Karp, Esq.
Department of Energy Resources
100 Cambridge Street
Suite 1020
Boston, MA 02114

Re: Implementation of New Renewable Energy Portfolio Standard for Class I and Class II Resources and Energy Portfolio Standard

Ms. Karp:

Enclosed please find Comments of Retail Energy Supply Association in the above case.

Please contact the undersigned if you have any questions.

Very truly yours,

Robert J. Munnelly, Jr.

RJM/mb
Enc.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF ENERGY RESOURCES

Implementation of New Renewable	)
Energy Portfolio Standard for Class I	)
and Class II Resources and Alternative	)
Energy Portfolio Standard	)

COMMENTS OF RETAIL ENERGY SUPPLY ASSOCIATION

Introduction and Summary

The Department of Energy Resources ("Department") has instituted this rulemaking to implement Section 32 of An Act Relative to Green Communities ("Green Communities Act" or "Act").[1] Section 32 of the Act essentially converts the pre-Act renewable energy portfolio standard focused on new renewable resources ("RPS") into a Class I RPS and also requires establishment of two new portfolio standards, namely, (1) a Class II RPS that supports investments in pre-1998 renewable resources, and (2) an Alternative Energy Portfolio Standard ("APS") that supports non-renewable alternative energy technologies. The proposed final regulations ("Proposed Rules") for the three portfolio standards (225 CMR 14.00, 15.00 and 16.00, respectively) were promulgated on December 31, 2008 and made effective immediately on an emergency basis. In a Notice of Public Hearing issued in late January, 2008 ("Notice"), the Department scheduled a February 5, 2009 public hearing and invited written comments on the Proposed Rules. The Retail Energy Supply Association ("RESA") gave a statement through counsel at the February 5 public hearing and hereby submits these written comments.

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1 St. 2008, c. 169.

RESA is a trade association that represents the interests of its members in regulatory proceedings in the New England, New York, Mid-Atlantic and Great Lakes regions. RESA's members include providers of competitive supply products to electricity and gas consumers in the five New England states that have restructured their electric markets.[2] RESA member companies sell thousands of megawatts of electricity to customers in Massachusetts each year and, consequently, they will be required to devote substantial financial and managerial resources to conduct their supply contracting activities to meet the letter and underlying policies of the three RPS compliance standards.

As discussed in more detail below, the Act bestowed on the Department considerable discretion in implementing the new portfolio standards. The Department was directed to set the precise definition of the facilities that would qualify for the new standards, the percentage of retail sales that would have to be procured from qualifying facilities, and the amount of the alternative compliance payment retail suppliers would have to pay in lieu of buying qualifying attributes. The Act did define the universe of suppliers to whom the standard would apply, and strongly implies the universe of contracts to which the standard would apply: "Every retail electric supplier providing service under contracts executed or extended on or after January 1, 2009, shall provide a minimum percentage of kilowatt-hour sales to end-use customers in the commonwealth from Class II renewable energy generating sources."[3] The Act did not, however, specify the exact date

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[2] RESA's members include Commerce Energy, Inc; Consolidated Edison Solutions, Inc; Direct Energy Services, LLC; Gexa Energy; Hess Corporation; Integrys Energy Services, Inc.; Liberty Power Corp.; Reliant Energy Retail Services, LLC; Sempra Energy Solutions LLC; SUEZ Energy Resources NA, Inc.; and US Energy Savings Corp. The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

[3] St. 2008, c. 169, § 32, codified at G.L. c. 25A, § 11F (2008) (hereinafter "Section 11F "). There is parallel language that defines the universe of suppliers to whom the APS applies: "The department shall establish an alternative energy portfolio standard for all retail electricity suppliers selling electricity to end-

upon which the new standards would become effective, leaving the Department the discretion to choose the timing of that implementation to avoid disruptions to existing contractual arrangements.

The Proposed Rules appear to apply the new portfolio standards to each and every kilowatt-hour of retail sales by suppliers beginning January 1, 2009, without regard to when the contracts pursuant to which those sales may have been made were executed or renewed. As discussed further below, this reading of the Act is at odds with the interpretation that best harmonizes the plain language of the statute and the policy goals underlying it while avoiding unfairness to suppliers and customers providing or taking service under contracts in place before the new regulations were promulgated. That balance is best struck by applying the new standards only to retail electric sales arising from "contracts executed or extended on or after January 1, 2009." All electric suppliers that addressed the issue at the February 5 hearing (Constellation, TransCanada, Direct, and RESA)[4] agreed that this aspect of the Class II and APS regulations is inconsistent with the Act and should be changed.[5]

During the February 5 hearing, the Department's Commissioner acknowledged the suppliers' concern regarding application of the new standards (the details of which were

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use customers in the commonwealth. Every retail electric supplier providing service under contracts executed or extended on or after January 1, 2009 shall provide a minimum percentage of kilowatt-hour sales, as determined by the department, to end-use customers in the commonwealth from alternative energy generating sources and the department shall annually thereafter determine the minimum percentage of kilowatt-hour sales to end-use customers in the commonwealth which shall be derived from alternative energy generating sources." Id. at § 11F1/2.

[4] Integrys, a RESA member company, also filed comments with the Department on October 15, 2008, urging it to adopt a prospective implementation of the new portfolio standards.

[5] Since the regulations for the Class II RPS and APS were issued on an emergency basis and were effective immediately, RESA respectfully requests that the Department rescind them effective as of January 1, 2009 and promulgate new regulations with an appropriate effective date.

announced for the first time only on January 2, 2009) to all contracts but raised his own concerns about the Department's ability to administer a system in which the new standards would apply only to a subset of a supplier's contacts. The Commissioner requested that suppliers address how the Department could verify compliance with the Class II RPS and the APS, considering that a retailer's electric supply contracts are not currently filed with the Department or other public agencies. In these comments, RESA will show that the compliance challenges are both manageable and temporary, and RESA and its members would be pleased to work with the Department and other stakeholders to develop procedures for this transitional period.

Overview of the RPS and APS

I. PRE-ACT RPS

Since 2003, Massachusetts law has embodied a single RPS that required electric suppliers, including utilities, to procure a certain portion of their kilowatt-hour sales to end use customers from new renewable energy resources that commenced operation or expanded their renewable capacity after December 31, 1997.[6] Qualifying renewable facilities included generating plants that use solar energy, wind energy, ocean thermal, wave or tidal energy, fuel cells, landfill gas, hydroelectric, certain biomass and other technologies.[7] The Pre-Act RPS increased the percentage of renewable energy that must be procured from these sources by .5 % annually for years 2004 through 2009 and by an

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6 Section 11F(a).

7 Id.

additional 1% for each year thereafter until a date determined by the Department's predecessor agency, the Division of Energy Resources.[8]

II. NEW RPS AND APS REQUIREMENTS

Principal provisions of Section 32 of the Act and the proposed final regulations are as follows:

RPS Class I: The Act converts the former new renewable standard described above into a new Class I RPS.[9] Consistent with the Pre-Act requirements, the percentage of resources that must be procured from qualifying Class I resources rises by .5 % through December 31, 2009 and by an additional 1% for each subsequent year.[10] The Act adds new technologies that qualify for Class I status, such as geothermal and marine or hydrokinetic energy generated by facilities that began commercial operation or increased their renewable capacity after December 31, 1997.[11] It also redefines qualifying hydroelectric facilities.[12] Suppliers may comply with the new Class I RPS by purchasing Renewable Energy Certificates ("RECs") or by making an Alternative Compliance Payment ("ACP").[13] The Class I ACP is currently $58.58 per megawatt-hour ("MWh") and will increase each year at the Consumer Price Index ("CPI").[14]

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8 Id.

9 Section 11F(a)-(c).

10 Section 11F(a).

11 Section 11F(c).

12 Id.

13 Proposed Rule, 225 CMR 14.08(3).

14 Press Release, Deval Patrick and Timothy Murray, Patrick Administration Announces Rules Providing More Support for Renewable and Alternative Energy (Jan. 6, 2009) (hereinafter the "Patrick/Murray Press Release").

RPS Class II: The new Class II RPS is designed to support the continued operation of older renewable energy facilities that began operation before December 31, 1997.[15] Class II resources generally include those facilities that would otherwise qualify for Class I status if not for their age, as well as certain waste-to-energy plants.[16] The Act leaves to the Department's discretion the amount of renewable energy that electric suppliers must procure from Class II resources, but requires the Department to specify that a certain percentage of these requirements shall be met through energy generated from a specific technology or fuel type described in the Act.[17] The Proposed Rules require electric suppliers to purchase RECs from Class II resources equal to at least 3.6% of their retail sales (commencing in 2009) or make an ACP.[18] The initial ACP for the Class II RPS is $25 per MWh for 2009, increasing each year by the CPI.[19]

APS: The APS is the second new standard. It is intended to foster investment in alternative energy technologies that advance clean air goals through energy efficiency, reduced reliance on fossil fuels and other means.[20] Eligible resources include combined heat and power, flywheel energy storage, energy efficient steam technology, carbon capture and permanent sequestration and other alternative technologies approved by the Department.[21] The Act also relies on the Department to determine the minimum amount of

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15 Id.

16 Section 11F(d).

17 Section 11F(e).

18 Proposed Rule, 225 CMR 15.07(a), 15.08(3)(a)(2).

19 Proposed Rule, 225 CMR 15.08(3)(a)(2).

20 Patrick/Murray Press Release.

21 Section 11F1/2(a).

resources that must be procured from APS facilities.[22] The Proposed Rules set the initial APS minimum standard at .75% of sales for 2009, which will increase by .5 % annually through year 2015.[23] After that date, the standard will rise by .25% annually, reaching 5% in 2020, and will continue upward at .25% during each year thereafter.[24] Compliance by suppliers will be by means of APS certificates or ACP at the rate of $20 MWh in 2009, which will be adjusted each year by the CPI.[25]

Comments

I. THE NEW CLASS II RPS AND APS SHOULD APPLY ONLY TO SALES ARISING FROM POST-JANUARY 1, 2009 CONTRACTS.

A. Introduction

All three of the Proposed Rules require electric suppliers to comply with the new RPS and APS requirements for all "sales" of electricity to Massachusetts end use customers that were made on or after January 1, 2009.[26] This approach is appropriate for the Class I RPS, which is based on the Pre-Act RPS that has been in effect for many years and has been incorporated into pricing for existing contracts. As it pertains to the new Class II RPS and the APS, however, this implementation approach is contrary to the most reasonable interpretation of the statute, namely, that the Legislature intended that the new standards should apply only to sales made under contracts executed or extended on or after the January 1, 2009 effective date. Such an interpretation would avoid the significant

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22 Id.

23 Proposed Rule, 225 CMR 16.07(1).

24 Id.

25 Id. at 16.08(1) & (3)(a)(2).

26 Proposed Rules, 225 CMR 14.07(1); 220 CMR 15.07(1); 225 CMR 16.07(1).

financial problems that would be visited upon retail suppliers and their customers if the Proposed Rules applied to existing contracts that were negotiated and priced before the new standards were established.

B. Principles of Statutory Interpretation Support RESA's Construction of the Act.

Under well-established principles of statutory interpretation, the Department must construe the Act "according to the intent of the Legislature ascertained from all its words . . . considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated. . . ." [27] Applying these principles and in the reasonable exercise of the substantial discretion afforded to it by the General Court, the Department should interpret the Act to limit application of the new Class II RPS and APS standards to sales made under contracts executed or renewed after January 1, 2009 and to "grandfather" sales made under existing contracts.

With regard to the Class II RPS, Section 32 states in pertinent part:

> Every retail electric supplier providing services under contracts executed or extended on or after January 1, 2009, shall provide a minimum percentage of kilowatt-hour sales to end use customers in the commonwealth from Class II renewable energy generating sources . . . . [28] Every retail supplier shall annually provide to end-use customers in the commonwealth generation attributes from Class II energy facilities in an amount to be determined by the department . . . .[29] (Emphasis added)

The phrase "contracts executed or extended on or after January 1, 2009" modifies the phrase "retail electric supplier providing services" and, as such, defines the universe of

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27 Sullivan v. Chief Justice for Admin. & Mgmt. of the Trial Court, 448 Mass. 15, 40 (2006).

28 Section 11F(d).

29 Id. at 11F(e).

suppliers and their services to which the new Class II RPS applies. The Proposed Rules give no meaning whatsoever to the phrase "contracts executed or extended on or after January 1, 2009" as a modifier of "retail electric supplier providing services." Instead, they apply the new Class II RPS to every sale made by every retail supplier after January 1, 2009. As such, the interpretation upon which the Proposed Rules rest violates the well-settled principle that statutes should not be construed to render any words or phrases superfluous.[30]

The Act uses similar language as it pertains to the APS. It states:

> The Department shall establish an alternative portfolio standard for all retail electricity suppliers selling electricity to end-use customers in the commonwealth. Every retail electric supplier providing service under contracts executed or extended on or after January 1, 2009 shall provide a minimum percentage of kilowatt-hour sales, as determined by the department, to end-use customers in the commonwealth from alternative energy generating sources . . . .[31] (Emphasis added)

The first sentence again appears to define the universe of suppliers and services to which the APS applies, in this instance, all retail electricity suppliers selling electricity in the commonwealth. However, if the APS applies to every kilowatt-hour sale as the Proposed Rules require, such an interpretation also renders the phrase "under contracts executed or extended on or after January 1, 2009" superfluous as a modifier of "retail electric supplier providing service." Thus, the Legislature clearly must have had another purpose in mind when it used that phrase in connection with the Class II RPS and APS.

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[30] See Risk Mgmt. Found. v. Commissioner of Ins., 407 Mass. 498, 502 (1990) ("[N]o clause, sentence or word shall prove superfluous, void or insignificant, if, by any other construction, they may all be made useful and pertinent"). The only other possible reading of this phrase would be to exempt suppliers that have ceased doing business in Massachusetts but have residual contracts with terms that extend beyond January 1, 2009. It is implausible that the Legislature's sole aim when it framed the above-quoted language of the Act was to provide special relief to suppliers that no longer wish to serve Massachusetts customers.

[31] Section 11F1/2(a).

RESA and the other suppliers present at the February 5 public hearing maintain that the most sensible interpretation of the Act, considering its language and the policy goals discussed in Part I.C below, is that the General Court intended to limit the application of the Class II RPS and the APS to sales arising from contracts made or renewed after the effective date of the standard, thereby excluding pre-existing contracts from their reach.

This interpretation is bolstered by a comparison of the different implementation text used for the Class I RPS.[32] Consistent with the fact that the substance of the Class I RPS requirements were in place with minor modifications for several years, the General Court implemented the Class I RPS requirements for all retail suppliers effective on January 1, 2009, without regard to contracts, as follows:

> The department shall establish a renewable energy portfolio standard for all retail electricity suppliers selling electricity to end-use customers in the commonwealth . . . . Commencing on January 1, 2009, such minimum percentage requirement shall be known as the "Class I" renewable energy generating source requirement.[33] (Emphasis added)

If the Legislature truly had intended for all sales by retail electric suppliers on or after January 1, 2009 to be subject to the Class II and APS requirements, it could have – and presumably would have – used substantially the same text as it did with respect to the Class I requirements, without any reference to "contracts executed or extended on or after January 1, 2009."[34] Accordingly, the Department should reasonably exercise its discretion and interpret the Act in a manner that would apply the new Class II RPS and the APS only to contracts entered into or renewed as of January 1, 2009. Such an approach would best

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32 Ciardi v. F. Hoffman-LaRouche, Ltd., 436 Mass. 56, 62 (2002) (statutes addressing same subject matter should be construed as a harmonious whole).

33 Section 11F(a).

34 See Spaulding v. McConnell, 307 Mass. 144, 149 (1940) ("Legislature [is] presumed to understand and intend the consequences of [its] own measures").

harmonize the language of the Act with the important policy goals and competing interests discussed below.

C. The Application of Class II RPS and APS to New and Renewed Contracts Accords with Sound Policies.

When, as here, a statute is ambiguous, "details of the legislative policy not spelled out in the statute may appropriately be determined by the agency charged with the administration of the statute."[35] In this case, the Department should recognize that a prospective implementation of the new Class II RPS and the APS would accord with the interests of retail suppliers and their customers and, accordingly, would make for sound legislative policy. In particular, it would allow suppliers to: (1) include the increased compliance costs of the new standards into the price of contracts as they are executed or renewed; and (2) make orderly business arrangements to procure Class II RECs and APS certificates on a systematic basis at prices that are less than the ACP. This holds down costs for retail suppliers and consumers (who likely would bear the brunt of increased costs through change-of-law provisions in existing contracts) and allows suppliers to develop Class II and APS procurement strategies.

Conversely, applying two new compliance regimes to sales from existing contracts, as the regulations do, would create significant challenges for suppliers and their customers. Suppliers would face the prospect of immediate unbudgeted and uncontracted for increases in compliance payments that would either have to be absorbed by the supplier until the contracts can be replaced or repriced or, alternatively, passed through to customers via change-in-law clauses in the supplier contracts. Both prospects are troubling for whoever bears the burden of paying such additional costs in these difficult economic times.

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[35] Hanover Ins. Co. v. Pascar, 421 Mass. 442, 446 (1995).

D. The Proposed Rules Provide Insufficient Notice to Suppliers.

The implementation approach for the new Class II RPS and APS is a far cry from the approach taken when the first RPS was implemented following restructuring of the Commonwealth's electric market in 1997. Even though there was very little retail activity at that time, electric suppliers were give ample notice of the new rules so that they could make orderly business arrangements to comply with them. The final regulations were promulgated on April 26, 2002 to be effective on January 1, 2003 (the first compliance year for the initial RPS). The proposed regulations, which were the equivalent of the regulations that are the subject of this proceeding, were published for comment on October 1, 2001, or 15 months before their effective date.

A thoughtful implementation of RPS standards is even more critical today given that over 50% of the electricity load in Massachusetts is served by competitive electric suppliers. In fact, adding new requirements to existing contracts is like changing the tires on a moving bus. The Proposed Rules, however, were not even received by suppliers until January 2, 2009, which marked the second day of the first compliance year (2009). This was the first time that suppliers learned of the actual percentages of Class II RPS and APS resources that would be required, the definition of qualifying facilities, and the price for the ACP. To require suppliers to immediately implement these standards for all existing contracts at this late date is unprecedented and incompatible with the smooth workings of the Massachusetts retail electricity market.

The alternate approach recommended by RESA and the other suppliers is more reasonable and consistent with earlier implementations of new RPS standards, which afforded suppliers notice and an opportunity to plan procurement strategies before the new

rules took effect. It also strikes a better balance between the interests of retail electric suppliers and their customers and the societal interests in the prompt implementation of new RPS regimes that support pre-1997 renewable generation and alternative energy technologies.

II. PROCEDURES CAN BE ESTABLISHED TO VERIFY COMPLIANCE WITH THE CLASS II RPS AND THE APS UNDER THE APPROACH ADVOCATED BY THE SUPPLIERS.

During the February 5, 2009 hearing on the Proposed Rules, the Department's Commissioner expressed concern to Direct Energy's representative that the Department may have difficulty verifying compliance with the Class II RPS and the APS if these standards apply only to a subset of supplier contracts, particularly given that such contracts are not on file with a public agency. The Department requested that retail suppliers address these compliance issues in their comments.

The implementation of the new RPS and APS will require the Department to develop new compliance forms under any scenario. The Class II RPS and the APS report form could be designed to include self-certification by an officer of the supplier made under penalty of perjury with respect to the following information to be included in the report:

(1) sales from preexisting contracts that are excluded from the standard;

(2) sales from contracts that are executed or extended after January 1, 2009 that are subject to the standard;

(3) the amount of the RECS or APS certificates, as applicable, that were procured to satisfy the standard for the sales set forth in (2) above; and

(4) the amount of ACPs made in lieu of certificate procurements.

If the Department does not wish to rely exclusively on the officer certification, the transitional procedures adopted by the Department should give it the right to conduct audits as part of its compliance reviews or otherwise request supporting documentation.

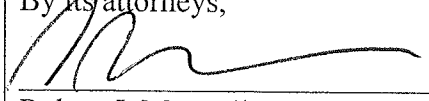
RESA and its members would be pleased to help develop reasonable provisions for reporting and verifying eligible contracts and associated RPS certificates and ACP payments during this transitional period for implementation of the Class II and APS portfolio requirements.

Conclusion

For the reasons described herein, the Department should revise the Class II RPS and the APS regulations to limit their applicability to sales arising from contracts executed or renewed after January 1, 2009, and rescind the emergency regulations that rendered the new RPS rules applicable to all sales as of January 1, 2009. RESA welcomes the opportunity to work with the Department to implement the compliance approach described in Part II above or other appropriate procedures that may be put forth by other stakeholders in this proceeding.

Respectfully submitted,

RETAIL ENERGY SUPPLY ASSOCIATION
By its attorneys,



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Dated: February 9, 2009